STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-23-440

CORE FINANCE TEAM AFFILIATES, LLC,

Appellee,

v.

MAINE HOSPITAL ASSOCIATION,
MAINE MEDICAL CENTER,
SOUTHERN MAINE HEALTH CARE,
and
FRANKLIN MEMORIAL HOSPITAL,

Appellants.

On Appeal from Decision of the Superior Court (Cumberland County),
Business and Consumer Docket

BRIEF OF APPELLANTS
MAINE MEDICAL CENTER, SOUTHERN MAINE HEALTH CARE, *and*
FRANKLIN MEMORIAL HOSPITAL

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I. INTRODUCTION

This is an appeal by three Maine hospitals[1] from a final judgment awarding Plaintiff-Appellee Core ("Appellee" or "Core") monetary relief in the amount of $566,582.25. The Business Court held two trials, one by jury that issued a verdict for the Hospitals and one bench trial, leading to the judgment on the Business Court's Findings, Conclusions, and Order. App. 0026-0041. The bench trial should not have occurred. For reasons developed below, the judgment entered after the bench trial must be reversed for errors of law. The Hospitals are entitled to judgment on the verdict.

There are no legally material disagreements about the what-happened facts, only disagreements about the Business Court's characterizations and assessments of them. Regardless, all the legally material facts are determined by the jury's verdict. The remedy chosen by the Business Court is legally impossible.

Although Core made no motion for judgment notwithstanding the verdict, that is the practical effect of the judgment. Although Core made no motion for new trial, a second trial occurred. It would have been legally erroneous to grant judgment notwithstanding the verdict or a new trial if either had been sought. Nevertheless, the Business Court wrongly conducted a second trial, without a jury, on the erroneous

[1] The three Appellant hospitals – Maine Medical Center, Southern Maine Health Care, and Franklin Memorial Hospital – will hereinafter be referred to collectively as "the Hospitals" or "Appellants." The caption is somewhat misleading in that the dispute between Core and the Maine Hospital Association has been severed and is the subject of arbitration proceedings not relevant on this appeal. App. 0080-0084.

premise that Appellee had a right to elect a theory denominated "unjust enrichment" as a viable basis for a huge contingency fee even after having lost a jury trial on its contract claim for that fee, and after having waived the proper remedy at law in *quantum meruit*. There are other subsidiary errors of law, but they are generally derived from and logically consistent with the fundamental legal error.

Even if the Business Court and Appellee were correct about the availability of "unjust enrichment," the Business Court's identification of the "benefit" from which to fashion a remedy for Appellee was also wrong. The benefit was not the money paid by the government to the Hospitals that earned it by caring for patients. It was a reasonable price for the OMS service that Core provided to the Hospitals. That amount would have been determined by the jury if Core had not waived its *quantum meruit* claim with the Business Court's approval. Having taken it upon itself to determine the value of the wrong benefit, the Business Court came to the wrong result.

Equitable relief is available only where a legal remedy is not. A party with a right to legal relief cannot waive it and seek equitable relief in the alternative. If every plaintiff could claim a right to elect an equitable remedy, just by waiving an available legal remedy, it would, as here, unconstitutionally deprive defendants in those cases of their right to jury trial. Here it would do even more than that. It would also unconstitutionally nullify a legally proper and factually correct jury verdict on the

dispositive issue and empower judges to choose an outcome diametrically opposed to that jury's unanimous verdict.

II. STATEMENT OF FACTS

The Social Security Act, through its Medicare and Medicaid programs, is a substantial insurer of the costs of medical and surgical and other healthcare-related needs of eligible beneficiaries. The program is administered under a complex set of regulations by the Centers for Medicare and Medicaid Services, known generally as "CMS." *See* Part A and Part B of Title XI of the Social Security Act (42 U.S.C.S. 1301 *et seq.*); 42 C.F.R. §§ 400-699. In determining how to compensate participating providers for services underwritten by the program, CMS requires periodic submission of information from providers such as these Hospitals. *See* 42 U.S.C.S. § 1395ww.

In addition to considering factors like diagnosis and treatment, whether a hospital is a teaching hospital, or provides a higher-than-average amount of Medicaid-eligible services, how providers and hospitals are paid by CMS is also affected by part of the reimbursement formula called the "wage index." Based on periodic collections of empirical data, the wage index adjusts payments to account for geographical differences in wages paid to healthcare workers. The wage index accounts for factors like the difference between labor costs for nurses in Brooklyn, New York and Houlton, Maine, for example. A major reason for this is that these labor costs are largely beyond the control of a single employer.

To make this adjustment to a hospital's reimbursement rate, CMS compares the annual national hospital wage level against wage levels of hospitals within a predetermined geographic region. The wage index is revised annually based on data that participating hospitals are required to provide. A higher ratio between a given hospital's wage index and the national average will result in a higher reimbursement rate. Put another way, hospitals that must compete in a labor market with a higher average hourly wage ("AHW") will have that additional cost recognized by CMS in how much those hospitals are reimbursed for patient care.

A second factor that affects the wage index for determining hospital reimbursement rates is the occupational mix survey ("OMS"). The OMS is used as a control or correction to the effect of AHW on the wage index adjustment in that it attempts to remove some of the variability in wage index values that can be attributable to hiring decisions by hospital administrators. Hospitals are required to report their OMS information to CMS every three years. CMS uses that OMS information to adjust a given hospital's reimbursement rate by looking at, among other factors, the levels of licensure of employees who provide direct patient care and help the hospital to run. This process reveals whether a particular hospital is relying on relatively too many highly qualified (and correspondingly highly paid) nursing providers than are required for quality patient care. AHW alone does not set the wage index, but the index may be restrained or reduced by OMS data showing too many highly qualified (and inferentially more highly paid) individuals delivering patient care.

The categories of employees that CMS considers in the OMS analysis are registered nurses, licensed practical nurses, surgical technologists, nursing assistants, orderlies, medical assistants and "all other occupations." For example, the OMS correction reduces reimbursement rates to hospitals using registered nurses to provide care that could be provided by nursing assistants, unnecessarily driving up AHW, which if not adjusted for OMS would artificially inflate the index in the geographic area.

It is typical, as was the case here, for hospitals to contract with businesses like Appellee to assist those hospitals with their AHW and OMS submissions to CMS. Companies like Appellee work with many providers in many locations. Appellee is not the only such vendor. Tr. 08/24/23, 57-58, 68, 96-97, 113-115, 136-137, 145-146, 180-181. In 2014, the members of the Maine Hospital Association elected to have the Association explore the prospects for a single vendor to do the work that was needed for its member hospitals. As agent for Appellant Hospitals, and other member hospitals not parties here, the Hospital Association completed a contract with Appellee as determined by the Business Court before the jury trial began. Tr. 06/05/23, 9-12; Tr. 06/07/23, 12.

The contract obligated Appellee to provide analysis and calculations for the AHW to the member hospitals participating in the group program. Appellants submitted their AHW data, received Appellee's calculations and output, and paid for

it in due course without controversy. The trials and this appeal are about the OMS work.

The Association-negotiated contract also specified optional process steps whereby member hospitals individually could "opt in" to have Appellee also perform the additional OMS review service on a 12.5% contingent fee or success fee basis. App. 0085-0105, Jt. Ex. 1; Tr. 06/07/23, 25. Appellants did not "opt in" to the contract for the contingent-fee OMS work. App. 0042-0043 (Verdict). Appellee did not communicate with any Hospital officials authorized to opt-in. Appellee elected instead to solicit information needed for OMS analysis from Appellants anyway, expressly assuming (wrongly as the verdict shows) that transmission of requested information would itself bind the Appellants to a contractual undertaking to pay a percentage fee. Tr. 06/07/23, 25-26; App. 0106-0107, Jt. Ex 8; Tr. 08/24/23, 84. Appellee requested information from employees of the Hospitals who typically provided information requested by vendors like Appellee for AHW or OMS work and other services, but who had no role in any of the contract processes and who had no authority to negotiate or agree to the payment terms for any work. Tr. 06/06/23, 20-21; Tr. 08/24/23, 118-121, 142-143. The solicited information was provided, and the OMS work was done. Improvements to the OMS presentations of the Appellants led to positive adjustments to the Hospitals' reimbursements because the previous triennial round of OMS data had, for one reason or another, differently described their respective OMS situations.

Years later, Appellee tendered its invoices for amounts reflecting the percentage that would have been applicable if the Appellants had opted into the OMS work on the proposed contingent fee percentage terms. Appellants refused to pay the contingency fee but offered to pay a non-contingent amount in line with what they had paid for such work in the past. Tr. 06/07/23, 27-30; Tr. 08/24/23, 147. The Hospitals were ready, willing, and able to pay the usual and customary or typical price for the service rendered, either as a flat fee or as an hourly fee, but they refused to pay a success fee or a contingent fee. *Id.* Tr. 08/24/23, 27-30.

Appellees then filed suit against the Hospital Association and the three Appellants. The first count of the complaint alleges breach of contract and the second seeks monetary relief for "unjust enrichment," calculated as a percentage of the increased reimbursements attributable to Appellee's work. App. 0047-0079. The Hospital Association case was stayed for arbitration and is not otherwise relevant to this Appeal. App. 0080-0084.

Appellants contended that the count for "unjust enrichment" fails to state a claim as a matter of law and that the only route to any monetary judgment for Appellee would have been in *quantum meruit,* a remedy at law. Tr. PTC Rec., 05/02/23, 36-40, Tr. 06/05/23, 9-12, Tr. 08/24/23, 103-108. Appellee refused to proceed in *quantum meruit*, and the Business Court explicitly honored Appellant's waiver of its *quantum meruit* remedy. *Id.*, App. 0044-0046. The case went to trial before a jury that

unanimously found that the Appellants had not contractually opted-in for the services to pay a percentage contingency fee or a success fee. App. 0042-0043.

Several weeks later, the Business Court conducted a second trial, without a jury, incorporating by reference, as applicable, evidence from the first trial, and entered the judgment here challenged on this appeal. App. 0026-0027, Tr. 08/24/23, 1-10. There was considerable evidence that the Business Court disregarded as not relevant to its theory of unjust enrichment. That evidence shows that there are multiple firms providing the same services on flat fee or hourly fee contracts. Tr. 08/24/23, 57-58, 68, 96-97, 113-115, 136-137. It proves a course of dealing between these parties in which the same work for which the Business Court awarded well over half a million dollars had previously been done for a very small percentage of that amount. Tr. 08/24/23, 87-88; App. 0108-0110, D. Ex. 19. It also shows that the late John Heye, at the time Chief Financial Officer of Maine Medical Center, the lead hospital in the region, explicitly rejected a previous overture to pay a percentage fee. Tr. 08/24/23, 60, 64, 82, 148-149.

Obviously, the Business Court's Findings, Conclusions, and Order, App. 0026-0039, speak for themselves but as a matter of transactional fact, the same work was previously done by Appellee for much less money, Tr. 08/24/23, 61-65, and would have been done in the instant circumstances by others for fixed or hourly fees, Tr. 08/24/23, 116-117. However, the Business Court determined that the "unjust enrichment" count elected by Appellee entitled Appellee to have the Business Court

assign a value to an asserted "benefit" (the adjusted reimbursements from CMS) not based on the usual and customary non-contingent price for the OMS service but based on a percentage of the difference in reimbursements occurring after Appellee's work. The percentage selected by the Court was larger than ever discussed by the parties and was never agreed to by the Hospitals. In other words, as an uncontested fact, historically and concurrently, the service provided by Core was available from others for a fixed or hourly fee at less than a tenth of the amount the Business Court awarded, but the Business Court treated that evidence as immaterial to its legal premise that Appellee was entitled, notwithstanding the verdict to the contrary, to a percentage of the change in reimbursements.

III. STATEMENT OF ISSUES PRESENTED

The fundamental issues are whether it was legal error for the Business Court to allow Appellee to proceed at all to a second, non-jury, trial on a theory of "unjust enrichment," and whether it was also legal error for the Business Court to characterize *quantum meruit* as an omitted affirmative defense. Contingently, assuming this case may properly be analyzed in equity for unjust enrichment, the issue becomes whether Business Court erroneously identified the "benefit" that is the essential predicate for any valuation analysis. Other rulings, e.g., on evidence, might typically be subject to review for clear error or abuse of discretion. Here, however, rulings that logically derive from the fundamental legal errors are reviewable *de novo* for error of law.

IV. SUMMARY OF ARGUMENT

On the transactional facts, Appellee had available (if supported by evidence) two remedies at law: (1) breach of an express contract or (2) *quantum meruit*. Appellee lost one and waived the other. The availability of those legal remedies precluded recourse to any form of equitable relief. Therefore, the Hospitals were entitled to judgment on Count II as a matter of law for failure to state a claim and the Hospitals were entitled to judgment on Count I on the jury verdict.

The bench trial was additionally erroneous because it deprived Appellants of their constitutional right to jury trial. *See* Me. Const. art. 1 § 20; *Portland v. De Paolo*, 531 A.2d 669, 670-71 (Me. 1987). The disputed issue, contingency fee or not, was explicitly covered by the written contract, and the jury had determined that the Hospitals had no duty to pay a success fee. Despite that, the Business Court awarded a success fee in an even larger amount than Appellee had claimed.

The Business Court's award in this case is in direct opposition to the maxim "equity follows the law," or *equitas sequitur legem*. *See Hedges v. Dixon Cty.*, 150 U.S. 182, 192 (1893) (quoting *Magniac v. Thomson*, 56 U.S. (15 How.) 281, 299 (1854)("that wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable.")).

Moreover, if any equitable remedy was available, the Business Court wrongly characterized and evaluated the positions of the parties, the patients, and the

government, with respect to the sources and amounts of funds, i.e., it wrongly identified the benefit that it wrongly characterized as unjust enrichment.

Appellants are entitled to judgment on the verdict together with their costs.

V. ARGUMENT

A. General Historical Context

Justice Holmes said, "a page of history is worth a volume of logic." *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921). That wisdom is particularly applicable with respect to the proper role of legal and equitable remedies in English and American legal history.

Between the time of the consolidation of royal power and the American Revolution, the King and the King's officials developed multiple court systems with different scopes of authority that inevitably overlapped to a degree. On the law side, primarily in Common Pleas and King's Bench, judicial remedies were available if, but only if, a plaintiff could plead and prove facts within one of the forms of action authorized by one of the writs. *See* F.W. Maitland, *The Forms of Action at Common Law* 1-9 (A.H. Chaytor & W. J. Whittaker eds., 1987).

Aggrieved parties whose claims for judicial redress did not fit within one of the forms of action at law might nevertheless seek intervention from the King or more aptly the King's officials in the Chancery. Over time, the Chancery Court became a third judicial institution providing relief when circumstances cried out for redress, but the forms of action at law provided none. Substantive doctrines and novel remedies

concerning corporations and trusts developed in the Chancery Court. Rules of discovery and remedies unavailable in the law courts, such as specific performance, constructive trust, resulting trust, accounting for profits, and various injunctions, including orders to discharge liens or release judgments at law were available in Chancery when, but only when, there was no legal remedy available. William M. Tabb, Rachel M. Janutis, Thomas O. Main, *Remedies* 31-32 (7th ed. 2021) (citing Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash. L. Rev. 429 (2003); Thomas O. Main, *ADR: The New Equity*, 74 U. Cin. L. Rev. 329 (2005)).

It has been and remains a settled cornerstone of our jurisprudence that equitable remedies are not available to a plaintiff who has an adequate remedy at law. *WahlcoMetroflex, Inc. v. Baldwin*, 2010 ME 26, ¶ 22, 991 A.2d 44; *Keniston v. JPMorgan Chase Bank*, 2007 ME 29, ¶ 9 n.6, 918 A.2d 436; *Stanton v. Trs. of Saint Joseph's Coll.*, 233 A.2d 718, 723 (Me. 1967); *Viles v. Korty*, 133 Me. 154, 155, 174 A. 903, 904 (1934); *York v. McCausland*, 130 Me. 245, 253, 154 A. 780, 783 (1931); *Titcomb v. McAllister*, 77 Me. 353, 357 (1885). As this Court aptly put it in *McIntyre v. Plummer Associates*:

> It is axiomatic that an equitable remedy … will not be granted where there exists an adequate remedy at law or where an adequate legal remedy, once available, has been lost by the failure of the party seeking equitable relief to pursue that remedy in a timely manner.

375 A.2d 1083, 1084 (Me. 1977) (internal citations omitted); *see also Kane v. Morrison*, 44 A.2d 53, 54 (Pa. 1945) ("Where a remedy is provided at law it must be strictly pursued. It follows that the doors of a court of equity which would be closed to a

vigilant litigant because he has a statutory remedy do not open to him upon his showing that he has ignored that remedy.") The error of law is the Business Court's disregard of that fundamental cornerstone principle and permitting Appellee to waive its legal remedy and elect recourse to an equitable remedy not available to it.

"Unjust Enrichment" was never a form of action at law. Unjust enrichment is a descriptor applied to situations that the law courts and the Chancery separately developed distinctive remedies to redress. The term has too often been used imprecisely both to explain equitable restitutionary remedies like accounting or constructive trust and to explain the rationale for the restitutionary actions at law including *quantum meruit*.

On the law side, over time, the technicalities of the law of contract, as in the actions of debt or covenant or assumpsit were eased by the development of newer actions at law including *quantum meruit*. It is not necessary to trace in detail the evolution of the interplay of evolving "procedural" rules and evolving "substantive" doctrine. It is important to recognize that the path from debt to assumpsit including special assumpsit and general assumpsit or *indebitatus* assumpsit and the common counts including *quantum meruit*, *quantum valebat* (goods sold and delivered), or money had and received, from *Slade's Case*, (1602) 76 Eng. Rep. 1074, through *Moses v. Macferlan*, (1760) 97 Eng. Rep. 676; 2 Burr. 1005, occurred entirely in the courts on the law side and culminated in the unification of all those common law forms of action

with all the recognized grounds for equitable remedies in one form of action, F.R. Civ. P. 2; M.R. Civ. P. 2.

The remedy for a person who has provided a service, expecting compensation, to a party who receives the service, expecting to pay for it, has long been and remains a judgment at law, not a decree in equity, if not for an agreed contract price, then for the fair value of the service in *quantum meruit* measured as a reasonable price for it. That amount is determined on evidence of custom and usage in the relevant line of business, the course of dealing between the specific parties, and evidence of comparable prices among similarly situated providers of the service. Restatement (Second) of Contracts § 33 cmt. a (Am L. Inst. 1981).

The Law Court has cautioned against using the term quasi-contract because its ambiguous and inconsistent use over time in a multiplicity of jurisdictions has been unhelpful in clarifying the analysis. *Paffhausen v. Balano*, 1998 ME 47, ¶ 6 n.3, 708 A.2d 269. Duly cautioned, we will refrain from using it except to note that the term quasi-contract, as a matter of historically sound analysis, makes some sense concerning the common counts in *quantum meruit* and *quantum valebat* because compensating a worker for services or compensating a seller for goods delivered or installed is not, but is similar to, enforcement of an express contract. "Implied contract" or "quasi-contract" are not the names of separate legal things, just descriptions of developments on the law side fitting transactional disputes into the common law system, building on the

evolving law of contract or assumpsit. In this case, the limit to any remedy Appellee could have had, given the verdict, is the "going rate" for providing OMS assistance.

By contrast, contingent fees, success fees, or percentage fees or commissions are generally not available unless explicitly agreed to, i.e., in an express contract, at least orally, or in many instances, only if stipulated in writing. *See, e.g.,* M.R. Prof. Conduct 1.5(c) ("A contingency fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue…."); 32 M.R.S. §13177-A(2) (requiring a real estate brokerage agreement to be a writing signed by the client). The customary practice in OMS work is in accord. Tr. 08/24/23, 101, 182.

Unlike the courts on the law side, the Chancery did not have the writ system and the associated forms of action. William M. Tabb, Rachel M. Janutis, Thomas O. Main, *Remedies* 31-32 (7th ed. 2021). In the Chancery, the pleader began with a "bill" describing the situation as one the pleader urged the Chancery to agree was entitled to judicial relief not available under the forms of action in the courts at law. The Chancery Court over time developed various now-familiar remedial devices to redress or prevent injustice. In the Chancery, circumstances constituting unjust enrichment led to equitable remedies like rescission of contracts, reformation of instruments, or cancellation of a deed or a note, with injunctive decrees compelling disgorgement or return of funds wrongly received or wrongly paid, but there was not an action for damages as such in the Chancery Court for something denominated as unjust

enrichment. *See* Restatement (First) of Restitution §§ Scope, 160 cmt. a (Am. L. Inst. 1937).

It was not entirely uncommon for a court sitting in equity to award damages as an ancillary or supplemental remedy often termed the "clean up" doctrine in a case that was primarily for injunctive relief or some other equitable remedy. *See Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994) (explaining "clean up" doctrine). One example would be a bill in equity to enjoin a neighboring landowner from grazing livestock on the plaintiff's real estate together with money damages for the trespasses preceding and justifying the injunction. *See, e.g., McDonald v. Bd. of Miss. Levee Comm'rs*, 646 F. Supp. 449, 474 (N.D. Miss. 1986) (enjoining defendant from appropriating grazing privileges without just and reasonable compensation). It would be unusual, however, for the Chancery to award straight up damages and only damages. That, however, is essentially what happened here.

As a matter of history and practice, the unjust enrichment remedies in Chancery have no place on these commercial transactional facts because disputes about these commercial facts are adequately remedied (if any remedy is justly warranted) either in contract (assumpsit) or *quantum meruit*.

B. Legal Remedies and Equitable Remedies in Federal Courts After the Merger

Before the promulgation of the Federal Rules of Civil Procedure in 1937, the state of procedural law in the federal courts was divided between the federal Equity

Rules, *see* 1 James W. Moore et al., *Moore's Federal Practice* § 1App.01[2][3] (3d ed. 2021), applicable to all cases on the equity side in all districts, and common law procedural rules that could vary from district to district to track local procedural practices but had much in common with common law pleading and procedural rules in England. Essentially contemporaneous with the new federal rules was the sea change in the jurisprudential underpinnings of state decisional law in *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938), overruling *Swift v. Tyson*, 41 U.S. 1 (1842), where Justice Story had relied on English cases declaring the general law applicable throughout the commercial law world at the time, even citing Cicero.

In 1938, *Erie* required federal courts sitting in diversity instead to apply the "substantive" decisional law of the applicable state. In 1937, the rules of "procedure" had been nationalized in the new federal rules.

C. The Merger of Law and Equity in the Courts of Maine

In 1959, the Maine Rules of Civil Procedure, modeled on the Federal Rules, also brought about the merger of law and equity. M.R. Civ. P. 2. This challenged Maine courts and lawyers alike to account for the formerly separate regimes in a single set of procedural rules. That, however, also did not change the fundamental rule that equitable remedies are not available if there is an adequate remedy at law. The merger did not entitle every plaintiff to elect an equitable remedy in preference to an available legal remedy. *WahlcoMetroflex, Inc.*, 2010 ME 26, ¶¶ 22-23, 991 A.2d 44.

There have been many Law Court decisions either deciding or discussing "*quantum meruit*" and "unjust enrichment," and the Court itself has acknowledged that neither its decisions nor its discussions have been entirely consistent and clear. *Paffhausen*, 1998 ME 47, ¶ 6 n.3, 708 A.2d 269 (collecting cases and detailing history of the Law Court's "effort to overcome considerable confusion between unjust enrichment and *quantum meruit*."); *see Danforth v. Ruotolo*, 650 A.2d 1334, 1335 n. 2 (Me. 1994); *Bowden v. Grindle*, 651 A.2d 347, 350 (Me. 1994); *Aladdin Elec. Assocs. v. Town of Old Orchard Beach*, 645 A.2d 1142, 1145 (Me. 1994); *A.F.A.B., Inc. v. Town of Old Orchard Beach ("AFAB II")*, 639 A.2d 103, 105 n.3 (Me. 1994). The Appellant Hospitals respectfully suggest that this case provides a further opportunity to clarify the vocabulary in ways that are consistent with the underlying principles as shown throughout English and American history.

All of this is made clear in the treatise, Horton & McGehee, *Maine Civil Remedies* §§7-3, 7-3(a), 7-4, 11-1 at 174-78, 227-229 (4th ed. 2004). The treatise states that under Maine law, a plaintiff cannot prevail on an equitable claim of unjust enrichment where a remedy at law under the doctrine of *quantum meruit* is available. *Id.*

> The doctrine of "unjust enrichment" is legally distinct from the doctrine of "*quantum meruit*". *Quantum meruit* involves recovery for the reasonable value of the services or materials provided under an implied contract. Unjust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship, but, on the ground of fairness, the law compels performance of a duty to pay. A plaintiff is not precluded, however, from pleading both theories of recovery because the court may find either that the implied contract exists and proceed to

> consider a claim in *quantum meruit* or that no form of contract exists and proceed to consider a claim of unjust enrichment.

Id. at 176-77.

A party with a meritorious claim arising from a transactional setting has remedies at law in breach of contract or *quantum meruit*. The Law Court has frequently recognized that *quantum meruit* is a remedy at law, thus precluding recourse to equity jurisdiction or equity remedies. *See WahlcoMetroflex*, Inc., 2010 ME 26, ¶ 22, 991 A.2d 44; *Cummings v. Bean*, 2004 ME 93, ¶ 9, 853 A.2d 221.

D. The Contract Controls

Here, these parties had a contract as the Business Court ruled before the jury trial began. Tr. 06/05/23, 9-12; Tr. 06/07/23, 12. The jury was not being asked *whether there was a contract*, but *whether the Hospitals were "contractually obligated to participate in the OMS Services component of the contract.*" App. 42-43 (emphasis added). The jury said "no." *Id.* The verdict is amply supported by the evidence, and there is no cross-appeal.

The Law Court has been particularly clear that where, as here, the parties have a contract addressing the very question at issue, the contract controls as a matter of law. *Nadeau v. Pitman*, 1999 ME 104, ¶ 14, 731 A.2d 863 ("The existence of a contractual relationship precludes recovery on a theory of unjust enrichment.") (internal quotation marks omitted*); see Knope v. Green Tree Servicing*, LLC, 2017 ME 95, ¶ 13, 161 A.3d 696; *June Roberts Agency, Inc. v. Venture Properties, Inc.*, 676 A.2d 46, 49 n. 1 (Me. 1996); *Top of the Track Assocs. v. Lewiston Raceways*, 654 A.2d 1293, 1296 (Me.

1995). This is so even if the party claiming under the contract is unsuccessful because, either way, the contract governs disputes about the rights and duties of the parties. *See Nadeau*, 1999 ME 104, ¶¶ 14-16, 731 A.2d 863 ("Because the termination of the parties' financial relationship was governed by a valid contract, the unjust enrichment theory could not be applied….")

In *Nadeau v. Pitman*, Dr. Nadeau retired from a small radiology practice with a written severance agreement between him and the partnership. *Id.* ¶ 4. Later, the partnership received a rebate of premiums from a mutual insurance company. The rebated premiums had been paid before Dr. Nadeau's retirement and he contended that the refund should flow through the partnership to the physicians who had paid them. *Id.* ¶¶ 7-10. The partnership disagreed, and the Law Court ruled that Dr. Nadeau's entitlements post-retirement were entirely governed by the severance agreement. *Id.* ¶¶ 14-18. Similarly, here, the jury verdict determined that, under the contract, Appellee was not entitled to a success fee, thus precluding as a matter of law any recourse to equity for a success fee. However, a party that unsuccessfully claims an express contract remedy at law may nevertheless have a remedy at law, i.e., in *quantum meruit*. That claim is often precluded by the contract (as in *Nadeau*). Dr. Nadeau's claim did not involve uncompensated services to the partnership and his claim for a share of the return of a premium was determined to have been addressed adversely to him in the severance agreement. Appellee's alternative (*quantum meruit)*

legal claim for compensation would have remained viable for trial to the jury but it was explicitly waived by Appellee and ruled inapposite by the Court.

Two Maine cases, taken together, illustrate the proper use of both *quantum meruit* and unjust enrichment. *Paffhausen*, 1998 ME 47, 708 A.2d 269 (quantum meruit) and *Bowden v. Grindle*, 651 A.2d 347 (Me. 1994) (unjust enrichment).

In *Paffhausen*, the Law Court acknowledged the "considerable confusion between unjust enrichment and *quantum meruit*," and then explained why the Superior Court in that case erred by allowing a carpenter to recover for unjust enrichment when the elements of *quantum meruit* had been met. *Paffhausen*, 1998 ME 47, ¶¶ 6 n. 3, 10-12, 708 A.2d 269. The carpenter had obtained permission from a building owner (including multiple written notes, but not a signed contract) to convert the building into a fine art print shop with an understanding that he would pay rent to the building owner once he "got the business up and running." *Id.* ¶ 2. After the building owner died, however, the arrangement fell apart between the carpenter and the personal representatives of the owner's estate. *Id.* ¶ 3. In a subsequent probate claim brought by the carpenter to be repaid for his carpentry work and material expenses, the probate court rejected the carpenter's *quantum meruit* theory but allowed him to recover a lesser amount as unjust enrichment based on what the court found to be the value of improvements to the building.[2] *Id.* ¶ 4.

[2] The *Paffhausen* Court defined the measure of damages for each as follows:

The *Paffhausen* Court reversed the probate court's decision on ground that the carpenter had, as a matter of law, satisfied the elements of *quantum meruit*[3] on the facts before the court. *Id.* ¶¶ 10-11. The Court reasoned that "[a]ll the law of *quantum meruit* requires [the carpenter] to prove, however, is that he had a reasonable expectation that his work was not gratuitous and that the [building owner] by her *words or conduct* justified this expectation." *Id.* ¶ 10 (emphasis in original).

In contrast, in *Bowden v. Grindle*, the Law Court held that the appropriate claim should have been for unjust enrichment and that the Superior Court, acting therefore in equity, was not bound by the jury's decision. In that case, the plaintiff sought to rescind a deed she had executed to convey her farm to her defendant relatives on ground that she lacked the requisite mental capacity at the time to convey the property. *Bowden*, 651 A.2d at 349. The defendants counterclaimed, seeking damages for the labor and materials they used to improve the property, labeling the claim "*quantum meruit*." *Id.* Although the plaintiff's claim for rescission was an equitable remedy, the parties and the court agreed that the jury's findings at trial would be binding as to the issues triable by right to a jury but advisory on the equitable claims. *Id.*

> Damages in unjust enrichment are measured by the value of what was inequitably retained. In *quantum meruit*, by contrast, the damages are not measured by the benefit realized and retained by the defendant, but rather are based on the value of the services provided by the plaintiff.

Id. ¶ 7 (internal citations omitted).

[3] "A valid claim in quantum meruit requires: 'that (1) services were rendered to the defendant by the plaintiff; (2) with the knowledge and consent of the defendant; and (3) under circumstances that make it reasonable for the plaintiff to expect payment.'" *Paffhausen*, 1998 ME 47, ¶ 8, 708 A.2d 269 (quoting *Bowden*, 651 A.2d at 351).

The Law Court held that the Superior Court erred in treating the jury's verdict as binding on the "quantum meruit" counterclaim (that should have been considered unjust enrichment) because the defendants performed the work on the farm under the belief that the property was their own. *Id.* at 350. The Court reasoned:

> The claim that the [defendants] labeled "*quantum meruit*" does not allege that the [defendants] ever expected to be compensated for their efforts. Rather, it alleges that if the [defendants'] deed is determined to be void, it would be inequitable for [the plaintiff] to retain the benefit of their labors without some payment. This claim is one for unjust enrichment.

Id. at 351. Because unjust enrichment is an equitable claim, the Court held that the jury's verdict as to the mislabeled claim of "*quantum meruit*" was not binding. *Id.*

Here, Core did have a reasonable expectation that it would be paid for its services, and the issue was only how much, depending on whether the Hospitals were "contractually obligated to participate in the OMS Services component of the contract," as framed in the jury verdict form. Certainly, Core – like the plaintiff in *Paffhausen* – did not expect that its work, the OMS portion of its services, had been performed gratuitously. And there is no argument by anyone that Core mistakenly thought it was performing the OMS work for its own benefit rather than for the Hospitals' benefit, as the defendants in *Bowden* thought they were renovating their own farm. Consequently, the Business Court erred in awarding Core damages on an unjust enrichment claim, much as the Superior Court erred in *Paffhausen* in allowing the carpenter to recover on an unjust enrichment theory.

In short, the Law Court has clearly and recently reaffirmed and clarified centuries of settled law, in line with the Horton & McGehee definitive *Maine Civil Remedies* treatise, and Appellee and the Business Court were wrong on the availability of equitable remedies. There was evidence (excluded from the jury but allowed at the bench trial) of custom and usage and course of dealing from which a jury could have determined in a properly tried *quantum meruit* case an amount that would have been less than ten percent of the number chosen by the Business Court. App. 0109-0110, D. Ex. 19; Tr. 08/24/23, 205-206. The Business Court's erroneous determination that Appellee had any right even to seek relief in equity has the impossible result of giving to Appellee the benefit of a bargain that the jury decided the parties never made and that the evidence shows the Hospitals would not have made. Tr. 08/24/23, 137-141, 181-182. This outcome is legally impossible on these litigation facts and these transaction facts.

Throughout, the Hospital Defendants correctly insisted that the Plaintiff had only a *quantum meruit* claim for the value of the service. The Business Court rejected those arguments. The Business Court wrongly ruled that the argument was improper because it rested upon an omitted affirmative defense.

The rules do not require a defendant, challenging the legal sufficiency of one of plaintiff's claims, to plead its explanatory argument as an affirmative defense. This is not textually apparent from Rule 8. M.R. Civ. P. 8(c); *see* 2 Harvey & Merritt, *Maine Civil Practice* §§ 8:5-8:19 at 363-376 (3d, 2021-2022 ed. 2021). Failure to state a claim

upon which relief can be granted is a defense, not an affirmative defense. *Me. Sch. Admin. Dist. No. 6 v. Inhabitants of Frye Island*, No. CV-18-008, 2018 Me. Super. LEXIS 112, at *3 n.5 (June 26, 2018) ("Failure to state a claim is not an affirmative defense and can be raised at any time."); *Ricker v. Wells Sanitary Dist.*, No. CV-84-81, 1985 Me. Super. LEXIS 244, *3 n. 1 (Aug. 29, 1985); *see* M.R. Civ. P. 12(h)(2) ("A defense of failure to state a claim upon which relief can be granted…may be made…at the trial on the merits."). Here, the Hospitals properly, indeed persistently, raised that defense in both trials. Rule 12(h)(2) requires nothing more. As authority for its erroneous ruling that the Hospitals waived their legal objections to Count II, the Business Court cites *Inniss v. Methot Buick-Opel, Inc.*, 503 A.2d 212, 218 (Me. 1986), a case in which an issue in question was not raised even through trial and thus was not properly before the Law Court. Here, Appellee and the Business Court were amply notified on the issue before and during the trials.

The Business Court cites a single decision from an intermediate appellate court in Texas to the effect that, in Texas, "the existence of an express contract is an affirmative defense to an equitable claim of quantum meruit or unjust enrichment." As a matter of Maine law, the Texas proposition is fallacious because *quantum meruit* is not an equitable claim. Moreover, that single opinion of a three-judge intermediate appellate court in Texas concerning Texas civil procedure is not determinative of the procedural law of Maine.

The Business Court also cited *Forrest Assocs. v. Passamaquoddy Tribe,* 2000 ME 195, ¶14, 760 A.2d 1041, but the cited paragraph in the cited case says nothing about affirmative defenses or their waiver. Likewise, the Business Court cited inaptly to *WahlcoMetroflex, Inc.*, 2010 ME 26, ¶ 22, 991 A.2d 44, though the cited paragraph states nearly the opposite, that there is an inherent bar that any plaintiff pursuing an unjust enrichment claim must overcome: "to pursue unjust enrichment in equity, the plaintiff must lack an adequate remedy at law." Maine Rule 12 (h)(2) in any event makes clear that Rule 8 does not require assertion of an affirmative defense to permit argument in support of a defense for failure to state a claim. Accordingly, the Business Court erred in ruling that Appellants had waived the basis for their objections and defenses to Count II of the complaint.

E. Even in Equity, the Judgment is Erroneous

As noted, the generic concept of "unjust enrichment" led to the development of remedies both at law and in equity that, after the merger, have caused confusion both of concept and vocabulary. For example, in cases such as this in which the defendant has received a service and paid nothing for it, courts have reasoned that the defendant was "unjustly enriched" by not paying the cost or usual price of the service. The "benefit" is having received a service without paying for it. Those are functionally *quantum meruit* cases, no matter how courts have labeled or mislabeled them. As demonstrated above, it would be a serious error of law, logic, language, and history to permit a *plaintiff* to usurp the *defendant's* right to jury trial by forgoing a legal remedy for

a fair price and receive instead a large share in the defendant's property. It ought not to be necessary to present, and the page limits prevent extended argument on the elemental truth that erroneous recourse to equity necessarily violates the constitutional right to jury trial. In short, Appellants had a right to a jury trial on all issues of law, including damages, and it was error of constitutional magnitude to allow Appellees to deprive Appellants of that right by electing – whether strategically or erroneously – to waive an available legal remedy and pursue instead an equitable one, in contravention of centuries of jurisprudence.

That said, as a matter of thoroughness, should the Law Court be persuaded by Appellee to depart from settled practice to permit Appellee to waive available legal remedies and seek a sum enormously greater than any reasonable price for the service rendered, the analysis in this case was also erroneous as a matter of equity jurisprudence. Absent agreement by the parties as to the mechanism or amount of compensation, as this jury found, the judicial task is to identify accurately and assess fairly the benefit received by the defendant that unjustly enriched the defendant.

The Business Court wrongly identified the benefit through which the Hospitals were unjustly enriched as money the Hospitals received from the government pursuant to federal statutes and regulations for serving patients eligible for Medicare and Medicaid coverage. The payment from CMS was to compensate the Hospitals for medical services provided by them to beneficiaries of the CMS programs. Appellee's work was solely to assist the Hospitals to receive the full amounts to which they were

legally entitled for their services. The money was not paid by Appellee. It is not money the government should have paid to Appellee instead of the Hospitals. Appellee served no patients.

The only benefit that can be the basis of judicial analysis of a restitutionary remedy for the provider of uncompensated services is the value of the service provided, i.e., its unpaid usual or customary price in the market. Here, however, such an analysis even if labeled "unjust enrichment" would award only that benefit, i.e., the amount available in *quantum meruit*, the remedy Appellee explicitly waived.

Given the Law Court's clarification of the roles of *quantum meruit* and unjust enrichment in *Paffhausen* and *Bowden,* it becomes clearer that unjust enrichment analysis seldom, if ever, occurs in a commercial law setting relating to compensation for services or goods. Cases decided since *Bowden* or since both *Bowden* and *Paffhausen* show that. *See Cassidy v. Cassidy*, 2009 ME 105, ¶ 10, 982 A.2d 326 (affirming the existence of a constructive trust for in-law parents who paid $130,000 without any contract or implied contract for labor and materials an in-law apartment on property later awarded to their ex-daughter-in-law in a divorce); *Thibeault v. Brackett*, 2007 ME 154, ¶¶ 13-17, 938 A.2d 27 (affirming a restitution award to plaintiff who paid money toward conversion of a hunting shack into a four-bedroom home on defendant's property to avoid unjustly enriching him); *Estate of Campbell*, 1997 ME 212, 704 A.2d 329 (affirming the imposition of a constructive trust in favor of the Estate to hold title to real estate that the defendant son improperly had his elderly mother convey to him

shortly before her death); *Knope v. Green Tree Servicing, LLC*, 2017 ME 95, ¶¶ 14, 23-24, 161 A.3d 696 (holding in the relevant part that homeowners who defaulted on their home loan would be unjustly enriched if they did not reimburse (make restitution to) the lender for expenses, such as back taxes, paid by the lender, that were not expressly covered under the promissory note). These are classic illustrations of traditional equity process and remedy, and each is distinguishable from the case at bar.

Moreover, the Business Court's analysis, having wrongly identified the benefit, vastly overstates the measure of its value. Substantial evidence is essentially uncontradicted that Appellee performed the OMS service in 2011 for noncontingent fees for Maine Medical Center and Southern Maine Medical Center aggregating $35,000, establishing a course of dealing for these parties. Tr. 08/24/23, 64. The evidence is uncontradicted that the only discussions these parties had concerning percentage fees involved explicit rejection of the idea by Maine Medical Center's Chief Financial Officer. Tr. 08/24/23, 60, 64, 82, 148-149.

The uniform point of the testimony by several witnesses is that contingent fees are unusual or highly unusual in the field for this work and that many firms perform this work for the kinds of amounts for which this Appellee itself had previously performed this work, perhaps adjusted for whatever inflation has occurred since. Tr. 08/24/23, 78, 116-117, 128, 137, 141, 181-182, 210, 213. It was an error of law for the Business Court to disregard that evidence, and the Business Court's disregard of

that evidence is accordingly not assessed by the normally deferential standards of clear error or abuse of discretion.

Defendant's Exhibit 19, App. 0108-0110, alone shows the relative value of AHW work and OMS work. For Maine Medical Center, the OMS work is listed as costing about a quarter of the amount for AHW. For Southern Maine Medical Center, it is about half. For Franklin, it is about sixty percent. In every instance, OMS service is substantially less expensive than AHW service. It is understood that this was appellee's effort in 2017 to regain the business and is explicitly discounted. Nevertheless, the important point remains that the hours needed to do the OMS work are always substantially fewer than the hours needed to do AHW work. In equity, as a matter of "unjust enrichment," the most generous "metric" to do equity is one that indicates the value of the real benefit, the service, on Appellee's own terms. Appellee waived the only remedy it justly could have claimed, calculated based on the ratios it accepted or proposed for AHW fees and OMS work on other occasions. Whatever the detailed math might have shown, the amount would have been less than a tenth of the amount awarded by the Business Court in disregard or defiance of the jury's verdict.

In many instances, this analysis might lead to remand for further proceedings. Here, however, Appellee stubbornly resisted trying the only legally tenable case it had and misled the Business Court into a legally impossible decision. These Hospitals would have and could have paid Appellee everything it deserved at far less cost than

Appellee's tactics required them to spend through two trials and this appeal. In equity of all places, Appellee should not now be rewarded with a "do-over" after deliberately waiving the correct path as Appellants repeatedly argued below.

The Business Court's imposition of a percentage fee that Appellants never agreed to pay shows that the benefit is not the purported difference between Appellant's receipts and an alternative world in which the OMS analysis was done in-house or by another vendor. In fact, it appears that the Business Court assumed or decided that there would have been *no* increment in reimbursements had the OMS work been done by another competent firm, itself a reversible error or omission.

The only fair reading of the Business Court decision is that whatever math Core did measures the *entire* "benefit," and that, notwithstanding the verdict, Core is equitably entitled to receive a 15%, not 12.5%, and not 100%, share of the entire adjustment of reimbursements to the Hospitals. As such, however, the decision is incongruous with the concept of unjust enrichment. If the true measure of the benefit to the Hospitals is the *entire* differential in reimbursements, the inescapable logic requires Appellee be paid *all* the money without providing any medical care for the benefit of CMS, or more to the point its beneficiaries.

This result would clearly be absurd. That is why it is legally impossible for the "benefit" to the Hospitals to be the change in reimbursements, and not simply the unpaid normal price for the service, especially if the increment in reimbursement

amounts that the competitors would have accomplished for a fixed fee in the mid-five-figure range is not shown or even suggested by any of the evidence.

In this analysis, it may be helpful to consider that, where there has been a fully formed express contract in a rising market or a falling market, the benefit of the bargain belongs to whomever successfully negotiated for it. It is backwards to think that a party should now be awarded the benefit of a bargain that was *not* made, *after* having made a contract specifying the circumstances under which it would have become entitled to a percentage fee *and after* a verdict determining that the contract terms were *not* met, and the Hospitals had *no* duty to pay a percentage fee.

If a painter paints a house without a judicially enforceable contract, the "law" (really the court) "implies" (really imposes) a contract-like payment obligation in the absence of a true contract. The missing price term, not having been agreed-upon, is supplied by the jury on evidence of a fair or usual and customary price for the work. Restatement (Second) of Contracts § 33 cmt. a (Am L. Inst. 1981).

If the painter and the painter's competitors in the market would have charged around $20,000 for the work, that is the damage. Even if every real estate appraiser in the community is now of the opinion that the house gained $40,000 in value after being painted, that damage would still be $20,000. The $40,000 gain in value would have been the homeowner's benefit of the bargain if the homeowner had made a bargain to pay the $20,000 price. When the court imposes a contract-like legal liability to avoid the homeowner's "unjust enrichment," the painter does not own the value

increment. Whatever the appraisers think is the amount of the increase in value of the house because of the paint job, it is not the measure of a painter's entitlement of a fair price for doing it. The restitutionary redress is to place both parties where they would have been if they had made a contract for the usual and customary price for the service. The remedy does not leave the painter better off than a real contract.

Having incorrectly identified the benefit to be valued, the Business Court undertook without any supporting evidence to award a 15% share of it to Appellee and leave the Hospitals who served the patients with 85%. This is a number in search of an analysis. Appellee indeed does three quarters or so of its OMS work for fixed fees like the one it accepted from two of these Hospitals in 2011. Tr. 08/24/23, 60, 78. Percentage fees are an anomaly and therefore are not the template for an equitable remedy, even assuming equitable remedies are available.

The Business Court apparently inferred from the magnitude of the reimbursement adjustments that the Appellee's work had been exceptionally skillful. A stronger inference is that there must have been some obvious corrections that anyone in the business could have made, not that Appellee's work was singularly creative and insightful. Indeed, creativity is not an element of value in truing up the economics of amounts to be reimbursed under a government program. Creativity or ingenuity is particularly unwelcome by the government with respect to the computation or calculation of amounts to be transferred by the government to providers of governmentally underwritten services to eligible recipients. The adjusted

amounts paid to the Hospitals were only a correction for an underpayment based on outdated or incorrect data used by CMS to determine how much to pay the Hospitals. The Hospitals were always entitled to these amounts because, under the OMS metrics, they were operating efficiently in their labor market, and they provided to CMS a current basis for correcting these payments.

Appellee offered no evidence of the costs incurred by the Hospitals for treating these patients and no evidence that the reimbursement increment did more than reduce the amount hospitals typically lose on Medicare and Medicaid patients. Especially in equity, a court should be concerned to identify correctly what the "benefit" is before declaring its retention to be "enrichment" or "unjust."

The custom and usage in the industry, the course of dealing between these parties, including John Heye's express refusal earlier to agree to any percentage fee, Tr. 08/24/23, 60, and the amounts charged in other comparable situations by other firms and previously by this firm establish a measure of recovery no greater than the amount that would have been available at law in *quantum meruit* if the claim had not been waived.

And so, the Plaintiff chose the wrong theory, and the Business Court allowed it. Having followed Appellee's lead into the wrong category of analysis, the Business Court then rejected the unanimous verdict of the jury that Appellee is not entitled to *any* form of percentage or contingent fee and awarded a sum ten times as much or more than any provider of this service would have charged and received for doing the

same work. What is most clear in this case is that a percentage of the reimbursements is *not* a permissible basis for calculating the fee for the Appellee's work even in equity because "equity follows the law." *See Hedges v. Dixon Cty.*, 150 U.S. at 192.

Also, in considering how an equity court would adjudicate an unjust enrichment situation, the Business Court gave entirely too little weight to Appellee's cynical "workaround" whereby it carefully avoided any communication with anyone at any of the Hospitals with authority to opt-in and who might have reaffirmed what John Heye had told Appellee previously about a percentage or contingent fee arrangement for this work. Tr. 06/07/23, 25-29. Appellee's principal, Robert Bradley Bowman—inequitably—exploited his knowledge that Maine Medical Center's Director of Reimbursement at the time, Thomas "Skip" Morgan, would respond to any inquiry from him for any data because of the other relationships between Appellee and Maine Medical Center. Tr. 06/07/23, 25-26; App. 0106-0107, Jt. Ex 8; Tr. 08/24/23, 84. Knowing that, as stated in an internal email, Mr. Bowman requested and received data enabling him to do the OMS work. As the jury correctly recognized, this was an unsuccessful effort to create a contractual obligation where none existed. This is not the kind of behavior that any court of equity acting equitably would reward in defiance of the jury's verdict. It should require nothing more than the verdict form to make clear that *no percentage fee was available* and to point out that the *only* basis for the judgment under review was the Business Court's contrary determination that *a contingent fee should be awarded.*

Postulating the alternative approach that would have occurred in an equity court on the premise that the equity court would have done anything at all after a verdict at law, Chancery would first have asked what would have happened here if Mr. Bowman had not short circuited the opt-in process, but instead called the Chief Financial Officer at Maine Medical Center instead of Mr. Morgan. As their testimony shows clearly, either Mr. Bowman would have relented and done the OMS work for a fixed fee or an hourly fee or not. If not, Appellee would not have done the work but somebody else would have. It does not matter what change in reimbursements would have occurred if the work had been done by someone else. Someone else would have been paid a flat fee or an hourly fee. In the court of conscience, where "equity regards as done what ought to have been done," the equity court, if it had this case, would have required these Hospitals to pay what they would have paid in a flat fee or an hourly fee to have the OMS work done, and that amount would have been entirely independent of whether Appellee or someone else achieved similar or different or better or poorer results. *See* John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 1235 at 739 (Students' Ed. 1907).

It should also be intuitively obvious that there would be little incentive for organizations of this size to agree to a percentage fee for this service. There was virtually nothing to gain by not paying the usual and customary rate because the usual and customary rate is not high. And, unlike the typical bodily injury plaintiff, who cannot afford to pay for hundreds of hours of professional time in discovery and trial,

the Hospitals can afford the usual and customary hourly or flat rate. In other words, for the Hospitals there was very little potential benefit in money to be saved and a lot of risk in potentially exorbitant fee payments in the rejected contingent fee proposal.

Conversely, it would create an unethical incentive for Appellee to take unacceptably aggressive steps and expose these Hospitals to adverse consequences at the hands of CMS. The amount used to calculate the percentage is not truly final. CMS has the power to audit or review past payments and demand offsetting future reductions to "true-up" the books. As the Business Court's math here illustrates, if it should turn out that some reanalysis of the mix of occupations used by these Hospitals in treating their patients leads to a lower reduction in AHW and a correspondingly higher reimbursement, the result is only that the Hospitals receive the full amount of what they had earned by treating these patients. This is neither enrichment nor injustice.

In summary, setting aside the not insignificant issue of the Hospitals' right to jury trial, even if this had been a matter eligible for adjudication in equity for an equitable remedy, the proper administration of the principles of equity jurisprudence would lead to precisely the same result as the restitutionary process at law in *quantum meruit*. Courts mistakenly applying the label "unjust enrichment" instead of "*quantum meruit*" that nevertheless get to a correct result, do so by administering the basic norms and rules of *quantum meruit* analysis under the wrong label. True unjust enrichment cases do not involve vendors and recipients of services.

VI. CONCLUSION

As things stood on the day the Complaint was filed, Appellee had available to it two familiar remedies at law. One was for breach of the contract it unsuccessfully contended the Appellees opted into by furnishing requested information, notwithstanding the absence of the opt-in steps stipulated in the Hospital Association arrangement. The other was in *quantum meruit* for the fair value of the service rendered.

Represented by highly skilled, experienced attorneys, Appellee deliberately elected to forgo the available legal remedy in *quantum meruit* and pursue instead what it characterized as a separate count in equity in what it called "unjust enrichment." The Business Court erroneously rejected the Hospitals' arguments on the law and entered the challenged judgment on the second count after a bench trial.

As a matter of settled law, the judgment must be reversed because the availability of legal remedies precluded any recourse to any form of equitable relief. Appellee lost in a jury trial on its first theory of recovery and irrevocably waived the second available legal remedy. Because Appellee intentionally refused to plead *quantum meruit*, it has waived its only path to any remedy. Appellants have spent far more litigating the unjust enrichment case and appealing from the judgment than they ever would have paid in *quantum meruit*. Therefore, in fairness and justice, this is not a circumstance calling for a new trial or further proceedings not inconsistent with the Court's Opinion. The legal invalidity of the pursuit of Count II, the waiver of *quantum*

meruit, and the verdict on Count I combine to require judgment on the verdict for Appellants.

Respectfully Submitted,

MARCH 22, 2024
Date

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CERTIFICATE OF SERVICE

I, Gerald F. Petruccelli, Esq., hereby certify that on this 22nd day of March 2024, two copies of the Brief of Appellants Maine Medical Center, Southern Maine Healthcare, and Franklin Memorial Hospital, were served by depositing same in United States Mail, postage prepaid, addressed as follows, and, as set forth below, by electronic mail:

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